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THE FEDERAL AMENDING POWER:  
GENESIS AND JUSTICIABILITY †

By LESTER B. ORFIELD\*

Genesis of Article Five<sup>1</sup>

**T**HE idea of amending the organic instrument of a state is peculiarly American. Although many of our political and legal institutions take their origin from English and occasionally Continental conceptions, such is not the case in the fundamental matter of altering the constitution. The idea of a written constitution was developed at a late stage of Western civilization, and the United States, not Europe, took the lead. The doctrine of popular sovereignty had an especially strong appeal to the inhabitants of the colonies in the latter half of the eighteenth century. The people were sovereign: it followed that they could make a constitution. Corollary to this, of course, they could revise and amend the document which they had adopted.

The first written charters or constitutions providing for their amendment appear to have been the charters of the Colony of Pennsylvania, which was the only colony to make such provision.<sup>2</sup> Eight of the state constitutions during the period between the declaration of independence and the meeting of the constitutional convention of 1787 contained amendment clauses. Even more

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†This article was written as a Research Fellow, University of Michigan School of Law, under the direction of Dean Henry M. Bates.

<sup>1</sup>U. S. Const. Article five is as follows:

"The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

<sup>2</sup>Poore, *The Federal and State Constitutions, Organic Charter, and Other Organic Laws*, 2nd ed., p. 1518, 1527, 1531, 1536.

important, the articles of confederation, defective as they were, made provision for their alteration. It was almost inevitable, therefore, that when the constitutional convention assembled some plan of revision would be presented.

The constitutional convention assembled on May 14, 1787, and at the meeting of May 29, Randolph presented the first plan for a new constitution in the form of fifteen resolutions.<sup>3</sup> The thirteenth declared that provision should be made for amendment of the constitution whenever thought necessary and that the assent of the national legislature should not be required. Charles Pinckney presented a proposed draft of a constitution at the same meeting.<sup>4</sup> Article sixteen of his draft set forth that if the legislatures of two thirds of the states should apply for a convention to amend the constitution, the national legislature should call one; or, in the alternative, Congress by a two-thirds vote of each house might propose, and two thirds of the legislatures might adopt. Both drafts were referred to the committee of the whole house.

On June 5, the convention discussed Randolph's resolution.<sup>5</sup> Pinckney expressed doubt as to the propriety or need of an amendment clause. Gerry defended it, however, on the grounds that such a new and difficult experiment required periodical revision, that the opportunity for such revision would stabilize the government, and that "nothing had yet happened in the states where the provision existed to prove its impropriety." Randolph's resolution was again brought up on June 9.<sup>6</sup> Several members thought it not a necessity; they furthermore thought it improper to dispense with the consent of Congress. Mason was of the opinion that the provision was necessary since the constitution, like the articles of confederation, would prove defective. It would be better to provide for amendments in an easy constitutional way than to rely on chance and violence. He was opposed to having Congress participate in the process since it might abuse its power and refuse to give its assent to changes desired. The resolution was unanimously adopted, but the clause dispensing with the consent of Congress was postponed for further discussion.

A long interval now occurred during which the convention appears to have ignored or overlooked the question of an amending

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<sup>3</sup>5 Elliot, *Debates*, 1866 ed., 128.

<sup>4</sup>Ibid, 132.

<sup>5</sup>Ibid, 157.

<sup>6</sup>Ibid, 182.

clause.<sup>7</sup> Randolph's original resolution, except as to congressional participation in amending, seems to have been the basis of action until August 6, when Rutledge of the committee of detail, to whom the resolution had been referred, delivered their report.<sup>8</sup> Article nineteen of their draft provided that Congress should call a convention on the application of the legislatures of two-thirds of the states. There was no discussion of the report until August 30, when Gouverneur Morris suggested that Congress be permitted to call a convention whenever it chose.<sup>9</sup> But the convention unanimously agreed to the article as reported by the committee.

The most serious and detailed discussion did not occur until the last week of the convention.<sup>10</sup> On September 10, Gerry moved to reconsider article nineteen. The constitution, he asserted, would be paramount to the state constitutions. Under the article, two-thirds of the states could obtain a convention, "a majority of which can bind the Union to innovations that may subvert the state constitutions altogether." He asked whether such a state of affairs should be brought about. Hamilton seconded Gerry's motion, but with a different motive than the latter. He did not object to the result described by Gerry and contended that it was no worse to subject the people of the United States to "the major voice," than to do so to the people of a particular state. He desired an easier mode of amendment than that provided in the articles of confederation, and regarded article nineteen as inadequate in accomplishing this. Like Gouverneur Morris, he proposed that Congress be given a free hand in calling a convention.

"The state legislatures will not apply for alterations, but with a view to increase their own powers. The national legislature will be the first to perceive, and will be most sensitive to the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power as the people would finally decide in the case."

James Madison also supported the motion for reconsideration. The language concerning the calling of a convention was too vague. It was not clear how the convention would be formed, nor by what rules it would transact business, nor what force its acts would have. The motion to reconsider was thereupon passed, nine states

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<sup>7</sup> Elliot, *Debates*, 1866 ed., 190, 351, 376.

<sup>8</sup>Ibid, 381.

<sup>9</sup>Ibid, 498.

<sup>10</sup>Ibid, 530-532.

favoring and one opposing. Sherman moved that Congress be permitted to propose amendments to the states, "but that no amendment shall be binding until consented to by the several states." Wilson moved to insert "two-thirds of" before the words "several states" in Sherman's proposal. This failed by a five to six vote, but a later motion by Wilson to insert instead "three fourths of" was adopted.

Madison then moved to postpone the amended proposition in order to consider a proposal of his own, worded much like the present article five providing for proposal of amendments by Congress either on a two thirds vote of each house or on application of the legislatures of two thirds of the states, and ratification by the legislatures or conventions of three fourths of the states. Hamilton seconded the motion. This proposal meant a significant change in the entire scheme. Instead of permitting amendment by a single convention, the plan made necessary the participation of the legislatures or conventions of the states. At this point Rutledge stated that he would never agree to an amending power "by which the articles relating to slaves might be altered by the states not interested in that property, and prejudiced against it." A proviso was then added to Madison's plan to meet this objection, and his amended proposition was adopted by a vote of nine to one.

Five days later as the convention was about to conclude its labors, the amendment clause was reported as article V by the committee of style and arrangement.<sup>11</sup> Sherman feared that "three fourths of the states might be brought to do things fatal to particular states; as abolishing them altogether, or depriving them of their equality in the Senate." He therefore thought it reasonable that the limitations on the amending power should be enlarged so as to provide "that no state should be affected in its internal police, or deprived of their equality in the Senate."

Mason believed that the proposed method of amending the constitution was "exceptionable and dangerous." Both modes required action by Congress either immediately or ultimately; hence no amendment of the proper kind could be obtained by the people if the government became oppressive, as he believed would be the case. Gouverneur Morris and Gerry then moved to amend the article so as to require a convention on the application of two

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<sup>115</sup> Elliot, Debates, 1866 ed., 551-552.

thirds of the states, in order to obviate this objection. Madison pointed out in response that he did not see why Congress would not be as much obligated to propose amendments applied for by two thirds of the states, as to call a convention on a similar application. He was not unalterably opposed to providing for a convention, but thought that difficulties might arise as to the form and quorum, matters which should be avoided in constitutional regulations. The motion for a convention was, however, unanimously adopted. Sherman moved to amend article five so as to require ratification of amendments by all state legislatures or conventions instead of three fourths of them, but his motion failed, seven to three. Gerry moved to amend so as to allow ratification only by the state legislatures and not by state conventions as an alternative method, but this failed, ten to one.

One last attempt was made to limit the amending power. Sherman in accordance with his previously expressed idea moved to annex at the end of the article a clause that "no state shall without its consent, be affected in its internal police, or deprived of its equal suffrage in the Senate." Madison objected that if such special provisos were added every state would insist on them, for their boundaries, exports, and other matters. Sherman's motion then failed, eight to three, the small states, Connecticut, New Jersey, and Delaware voting for it. He then moved to strike out article five altogether, and this motion also failed, by an eight to two vote. Gouverneur Morris moved to annex the simple proviso, as it now appears in article five, "that no state, without its consent, shall be deprived of its equal suffrage in the Senate." And as Elliot concisely reports it, this motion, "being dictated by the circulating murmurs of the small states, was agreed to without debate, no one opposing it, or the question, saying no." At this same meeting the entire constitution as amended was accepted by the convention, and ordered to be engrossed. Two days later on Monday, September 17, the engrossed constitution was read and signed, and the convention adjourned.

#### JUSTICIABILITY OF AMENDMENTS

Is the question of the validity of an amendment a legal question? Or is it a political question? If it be a political question, it would lie in the sphere of the political department,—the legislative or the executive, or both.

To one not particularly familiar with constitutional law the notion of a court's passing on the legality of a constitutional amendment may seem strange. To such it would perhaps seem correct that the courts should unquestionably assume the validity of the constitution and its amendments as an irreducible minimum in the decision of cases. To a Continental lawyer accustomed to a legal system in which the courts may not declare even a statute invalid, the idea of a court's determining whether or not a constitutional amendment is valid or not would seem astonishing. Even one familiar with American constitutional law might well have had some doubts before the litigation over the legality of the eighteenth and nineteenth amendments. The only previous instance in which the Supreme Court of the United States had passed on the legitimacy of an amendment to the federal constitution had arisen more than a century previously in the case of *Hollingsworth v. Virginia*,<sup>12</sup> as to the adoption of the eleventh amendment. In that case the attorney general of the United States who defended its legality made no attempt to show that it was a political question, and the court did not discuss the question. The case can therefore be cited only to the effect that the court and the parties assumed it to be a legal question. The court moreover passed only on the legality of the procedure of amendment, and not on the content of the amendment itself. In the later and much cited case of *Luther v. Borden*,<sup>13</sup> the Supreme Court declared in dictum that the question of the validity of the adoption of an amendment was a political question. This case attracted great attention and was widely cited in the state decisions, so that many came to have the view that the question was political. Last of all, inasmuch as the courts have not assumed to pass on the constitutionality of the constitution itself, there is some logic in arguing that since an amendment becomes as much a part of the constitution as any other part of it, in fact repeals any part inconsistent with it, as a result, the legality of an amendment is no more open to attack than that of the constitution itself.

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<sup>12</sup>(1798) 3 Dall. (U.S.) 378, 1 L. Ed. 644.

<sup>13</sup>(1849) 7 How. (U. S.) 1, 39, 12 L. Ed. 581. Taney, C. J. said:

"In forming the constitutions of the different states, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the state, and the judicial power has followed its decision." As late as 1888 it was asserted that this case "is still the law of the federal courts" in *Smith v. Good*, (C.C.R.I. 1888) 34 Fed. 204.

It may be laid down dogmatically that the constitutionality of the constitution itself is a political question.<sup>14</sup> In the first place it would seem a contradiction in terms to raise such a question, except in reference to the matter of its having been validly adopted according to the previously existing constitution. Where the existing constitution has come into operation through a revolution, obviously a very dangerous problem would arise if the courts should attempt to pass on the validity of the new constitution. Where the new constitution has not been the result of a revolution, a new government has not begun to function under the new constitution, the people have not acquiesced, and the old courts hang over, they could declare the new constitution void.<sup>15</sup> If a new government had commenced to operate under the new constitution and there was popular acquiescence, or if simply a new government, executive and legislative, had taken their oaths under the new constitution, it would perhaps be logically possible for the old courts to declare the new constitution invalid. But where

<sup>14</sup>*Luther v. Borden*, (1849) 7 How. (U. S.) 1, 12 L. Ed. 581; *Smith v. Good*, (C.C.R.I. 1888) 34 Fed. 204; *Brickhouse v. Brooks*, (C.C.Va. 1908) 165 Fed. 534; *Dorr's case* in 2 Wharton, *Criminal Law*, 5th ed., sec. 2777; *State v. Starling*, (1867) 15 Rich. L. (S. C.) 120; *Koehler v. Hill*, (1883) 60 Iowa 543, 14 N. W. 738, 15 N. W. 609; *Miller v. Johnson*, (1892) 92 Ky. 589, 18 S. W. 522, 15 L. R. A. 524, constitution held valid although the convention elected to draft it made several changes in it after it had been voted on by the people of the state; *Taylor v. Commonwealth*, (1903) 101 Va. 829, 44 S. E. 754, constitution upheld though it had never been submitted to popular vote; *Carpenter v. Cornish*, (1912) 83 N. J. L. 696, 85 Atl. 240, affirming 83 N. J. L. 254, 83 Atl. 31; *O'Neill, J.*, dissenting in *Foley v. Democratic Parish Committee*, (1915) 132 La. 220, 70 So. 204. "When, however, a state government has been formed, and the state admitted to the Union with a given constitution, courts must recognize, and are as fully bound by, the fact as the merest citizen; and I submit, with all respect, that we can as well dispute the validity of the United States constitution, because the convention framing it, disregarding all instructions limiting its members to making amendments to the old articles of confederation, assumed to make an entirely new form of government, as can we inquire into any supposed irregularities or illegalities which may have entered into the construction of our own." *Brittle v. People*, (1873) 2 Neb. 198, 210.

<sup>15</sup>*Loring v. Young*, (1921) 239 Mass. 349, 132 N. E. 65. The paucity of precedent on this point seems to have led to the broad view frequently asserted that the validity of a constitution is not assailable at any stage. In 15 L. R. A. 524, the commentator on *Miller v. Johnson*, (1892) 92 Ky. 589, 18 S. W. 522, 15 L. R. A. 524, points out that since there is no question of opposing governments, or of the existence of the court and since the adoption of a new constitution is in effect only an amendment of the old one, and does not in fact upset the existing government, "it is difficult to see why the question of lawful adoption is not as much a judicial question in case of a new constitution as it is in the case of an amendment, *eo nomine*."

the courts, as well as the other branches of the government, are operating under the new constitution, it seems inconceivable that they could pass on the validity of the instrument which is their creator. In theory, the court might decide the new constitution was invalid. But this would be tantamount to a declaration that the court itself no longer exists, since it was the creature of the constitution. The futility of the proceeding would make such a decision unlikely. As an actual fact such a court might continue to exist if the other departments of government accepted and enforced the decision, but this would seem to be a case of usurpation.

From the fact that the courts cannot declare the existing constitution invalid, it logically follows that they cannot so declare any part of it (exclusive of amendments).<sup>16</sup> In fact, to do this would seem even less justifiable than to nullify the whole new constitution, for in recognizing part of a new constitution it must recognize its entire validity. Since the old constitution is no longer in existence, there is no authority on which it can predicate a declaration that a part of the new constitution is invalid.

The view that the courts may not declare the existing constitution or a part of it (exclusive of amendments) invalid has particular force as to the federal constitution. In the case of the states many of them have adopted wholly new constitutions in pursuance, in most cases, of the mode prescribed in the previous constitution. In such cases there is doubtless justification for the courts' passing on the validity of the new constitution, though as a matter of fact such cases have been very rare. But the constitution of the United States was not adopted according to the mode prescribed in the article of confederation. In other words, our existing constitution is the product of a revolution, bloodless though it was.<sup>17</sup> The Supreme Court and all the other federal

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<sup>16</sup>*Carpenter v. Cornish*, (1912) 83 N. J. L. 696, 85 Atl. 240. But this view seems to have been departed from in a number of Louisiana cases arising over the 1920 state constitution. *Huff v. Selber*, (D.C. La. 1925) 10 F. (2d) 236; *Pender v. Gray*, (1921) 149 La. 184, 88 So. 786; *State v. Judge*, (1921) 149 La. 363, 89 So. 215; *State v. Jones*, (1922) 151 La. 714, 92 So. 310. An earlier case *State v. American Sugar Refining Co.*, (1915) 137 La. 507, 68 So. 742, is partially explainable on the ground that the constitution then made no provision for a convention, that the people by popular vote adopted the legislative restrictions as to subject-matter imposed on the convention, and that the constitution was never ratified by popular vote. O'Neill, J., dissented on the ground that if part of the constitution could be declared invalid, the whole might be. See also, *Foley v. Democratic Parish Committee*, (1915) 138 La. 220, 70 So. 204.

<sup>17</sup>Jameson says that "it is clear that the act of disregarding the

courts are and always have been the creatures of the existing constitution. Thus there has never been any court before whom its invalidity might be asserted. The federal courts have never assumed to pass on the validity of the original constitution or any part of it, and have never admitted that it was the creature of revolution, though the commentators have frequently pointed it out.

Passing from the question of judicial cognizance of the validity of the constitution to that of an amendment thereto, it would not be illogical to expect somewhat the same treatment of the problem.<sup>15</sup> The adoption of a constitution and the adoption of an amendment certainly have many points in common. In both there is the exercise of the highest sovereign power of the state. The adoption of an amendment is the adoption of a constitution in little. It is conceivable that over a long period of time a constitution might be so altered as to bear little resemblance to the original document. Looked at from one point of view, an amendment is of even greater import than the original provisions of the constitution since it automatically repeals all clauses inconsistent with it.<sup>19</sup> It may even repeal a Supreme Court decision.<sup>20</sup> Looked at from a prac-

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provisions of the 13th of the articles of confederation, was done confessedly as an act of revolution, and not as an act within the legal competence of either the people or the convention, under the constitution then in force." Constitutional Conventions, sec. 564. Under article XIII, Congress should have proposed and the legislatures of every state should have ratified the constitution. Technically, every step was complied with except that ratification was by three fourths of the states (though all eventually ratified), inasmuch as the constitutional convention sent the constitution to Congress, which at the advisory direction of the convention transmitted it to the state legislatures, who in turn at the recommendation of the convention passed it on to the state conventions. The framing of an entirely new constitution in violation of the directions of Congress and the designating of the ratifying bodies have been asserted to be revolutionary, but if the convention be regarded as an advisory body the only illegal step was ratification by less than a unanimous vote. The ground of necessity pleaded by Randolph seems a rather dubious legal justification. See also, Cooley, Constitutional Limitations, 8th ed., p. 9; 1 Burgess, Political Science and Comparative Constitutional Law 98; McCulloch v. Maryland, (1819) 4 Wheat. (U.S.) 316, 403, 4 L. Ed. 579.

<sup>18</sup>In *Smith v. Good*, (C.C.R.I. 1888) 34 Fed. 204, it is asserted that both questions are political; while in *Loring v. Young*, (1921) 239 Mass. 349, 132 N. E. 65 that both are judicial, *Luther v. Borden*, (1849) 7 How. (U.S.) 1, 12 L. Ed. 581, being distinguished on the ground that in that case two rival governments were arrayed against each other in armed conflict.

<sup>19</sup>*Johnson v. Tompkins*, (C.C. Pa. 1833) Baldwin 571, 598, Fed. Cas. No. 7416; *Osborn v. Nicholson*, (C.C.Ark. 1871) 1 Dill. 219, Fed. Cas. No. 10595; *University v. McIver*, (1875) 72 N. C. 76; *Grant v. Hardage*, (1913) 106 Ark. 506, 153 S. W. 826.

tical standpoint, however, the chief difference is seen to be that an amendment does not generally produce so comprehensive and so serious an effect on the existing frame of government. The courts are left relatively free to see that the prescribed constitutional mode of alterations is complied with.

If the constitution made specific provision for the submission of the question of the validity of an amendment to a designated tribunal, it might perhaps be asserted that this is not a question for the courts,<sup>21</sup> though even this has been doubted.<sup>22</sup> Article five, however, is silent, so that there is much reason to assert that this, like so many other controversies which may arise over the interpretation of the constitution, is a legal question.<sup>23</sup> The theory of the courts is doubtless that back of the power to declare laws unconstitutional. "The constitution is the supreme law of the land, and the courts are the special guardians of that law." The Supreme Court may set aside any unconstitutional act of Congress or of the president, and reverse its own and the decisions of the lower courts where the interpretation was erroneous. From this it follows that where there is a failure to follow the regular mode of amendment prescribed in article five, the courts may regard the procedure as null and void.

The courts of the United States in both the states and the nation have taken cognizance of an increasing range of cases. In international law constant efforts are being made to reduce the scope of political questions. In the state courts there has been an increasing development of judicial control over the amending

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<sup>20</sup>The 11th, 14th, and 16th amendments operated to nullify previous decisions. Such would also be the effect of the Child Labor Amendment. The 11th amendment operated retroactively.

<sup>21</sup>*Worman v. Hagen*, (1893) 78 Md. 409, 28 Atl. 397. In *State v. Swift*, (1880) 69 Ind. 512, two judges dissenting, it appears that the court assumed the validity of a statute interpreted to allow the governor to ascertain the adoption of an amendment; in *Rice v. Palmer*, (1906) 78 Ark. 432, 96 S. W. 396, there is dictum that a statute could establish a special tribunal for the purpose. Jameson is of the view that Congress alone has the power to pass on amendments except in suits between individuals. Jameson, *Constitutional Conventions* 626.

<sup>22</sup>*McConaughy v. Secretary of State*, (1909) 106 Minn. 392, 119 N. W. 408. But this seems improper since the courts are bound by the constitution as well as the other departments of the government.

<sup>23</sup>In practice, Congress has several times in effect decided on the meaning of article V. In resolutions it has asserted that the approval of an amendment by the president is unnecessary, that two thirds of a quorum of each house of Congress is the majority required for proposing amendments, that the 14th amendment was ratified, and that states may not withdraw their ratifications.

process. *Hollingsworth v. Virginia*<sup>24</sup> seems to have been the first case, either national or state, in which the validity of an amendment was passed on. But as has been stated no attempt was made to show that the issue was a political one; the question moreover was simply one as to the procedure of the amendment; and the court upheld the validity of the amendment. In 1836 the first state case was decided upholding the right of the courts to inquire into the validity of amendments. But the opinion of the court was brief, and like the prior federal case upheld the validity of the amendment.<sup>25</sup> In 1849 the federal Supreme Court asserted in dictum that the question was political.<sup>26</sup> Until the recent cases on the eighteenth and nineteenth amendments, this was the only pronouncement of the court on the subject, so that if there had been no intervening circumstances, the court might have adhered to its view in that case. This circumstance has been the constantly increasing litigation in the state courts over the validity of amendments. In 1854 the Alabama court in *Collier v. Frierson*<sup>27</sup> asserted that it was a judicial question and held an amendment invalid. The case is notable for the fact that it is the first case before 1880 holding an amendment unconstitutional. In 1856 the Mississippi supreme court held the question a judicial one.<sup>28</sup> In 1864, however, the Maryland court took the view that it was a political question.<sup>29</sup> In 1876 the Minnesota court regarded it as judicial.<sup>30</sup> In 1880 only about seven cases had arisen in which the validity of an amendment was attacked in the courts. Up to 1890 about twenty such cases had arisen. But since that date a large number of cases have been decided.

The decisions have been virtually unanimous to the effect that the question is judicial, and the state courts now exercise supervision over every step of the amending process. *Luther v. Borden*

<sup>24</sup>(1798) 3 Dall. (U.S.) 378, 1 L. Ed. 644.

<sup>25</sup>State v. McBride, (1836) 4 Mo. 303.

<sup>26</sup>Luther v. Borden (1849) 7 How. (U.S.) 1, 12 L. Ed. 581.

<sup>27</sup>(1854) 24 Ala. 100.

<sup>28</sup>Green v. Weller, (1856) 32 Miss. 650.

<sup>29</sup>Miles v. Bradford, (1864) 22 Md. 170. The same view has since been taken in *State v. Swift*, (1880) 69 Ind. 512, power of political department inferred from a statute; Beck, J., dissenting in *Kochler v. Hill*, (1883) 60 Iowa 543, 568; Van Syckel, J., dissenting in *Bott v. Wurts*, (1897) 61 N. J. L. 160, 38 Atl. 848; McCulloch, J., dissenting in *Rice v. Palmer*, (1906) 78 Ark. 432, 96 S. W. 396, pointing out that if the question is judicial the validity of an amendment is never definitely settled.

<sup>30</sup>Dayton v. St. Paul, (1876) 22 Minn. 400.

was discussed by many of the courts, and the limited holding of that case was precisely defined.<sup>31</sup> With such an historical background, it is not peculiar then that the Supreme Court of the United States when it came to passing on the eighteenth and nineteenth amendments was prepared to view the issue as judicial.<sup>32</sup>

The rule that the validity of an amendment is a judicial question does not solve all the difficulties that arise, however. The legality of an amendment when analyzed may present two problems. First, was the procedure prescribed in the amendment clause of the constitution regularly followed? Second, granted that the procedure was regular, is the amendment valid in its substance? The vast majority of cases have involved the first point, and have regarded it as unquestionably a judicial question. The number of cases dealing with the second issue has been small, and the outcome has not been so decisive. *In Hollingsworth v*

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<sup>31</sup>In that case two rival governments were in armed conflict; the validity of a constitution, not an amendment, was in issue, and the opinion was therefore dictum; federal jurisdiction was involved as to the validity of a state constitution, and not of a federal amendment; the constitution of Rhode Island provided no mode of amendment. There are dicta in a few cases that when the amendment relates to the existence, power, or functions of the courts, the question is political. *Koehler v. Hill*, (1883) 60 Iowa 543; *State v. Powell*, (1900) 77 Miss. 543, 27 So. 927, 48 L. R. A. 652.

<sup>32</sup>The trend of opinion as to the federal constitution has not always been so clear, however. In *White v. Hart*, (1871) 13 Wall. (U.S.) 646, 20 L. Ed. 685, the court in dictum intimated that the validity of the Civil War amendments was a political question. In *Smith v. Good*, (C.C.R.I. 1888) 34 Fed. 204, Colt, Circuit Judge, asserted that the validity of an amendment is a political question, and cited *Luther v. Borden* as controlling. But in *Knight v. Shelton*, (C.C.Ark. 1905) 134 Fed. 423, also involving the validity of a state amendment, the question was regarded as judicial. In *Anderson v. Myers*, (C.C.Md. 1910) 182 Fed. 223, the court passed on the validity of the 15th amendment and seems to have assumed that the substance of an amendment was a judicial question. In *Feigenspan v. Bodine*, (D.C.N.J. 1920) 264 Fed. 186, involving the 18th amendment, it is suggested that only the political department can declare an amendment void for violating alleged implied limitations as to substance. In the *National Prohibition Cases*, (1920) 253 U. S. 350, 381, 40 Sup. Ct. 486, 64 L. Ed. 946, the solicitor general argued that both the ratification and scope of amendments were political. Former Attorney General Albert E. Pillsbury of Maine argued in 1909 that the scope is a political question. The Fifteenth Amendment, 1909 Maine St. Bar Ass'n 17, 26. Wayne B. Wheeler urged in 1920 that the validity of the 18th amendment was a political question. *The Constitutionality of the Constitution Is Not a Justiciable Question*, 90 Cent. L. J. 152. Recently the peculiar view has been offered that the Supreme Court has no jurisdiction to uphold an amendment taking away reserved powers of the states. *Stevenson, States' Rights and National Prohibition* 99-118. There is an excellent discussion by *Dodd, Amending the Federal Constitution*, (1921) 30 Yale L. J. 321.

*Virginia*<sup>33</sup> the issue was as to the necessity of the approval of an amendment by the president, thus presenting a question of procedure only. Thus when the recent federal cases arose there was no precedent in the decisions of the Supreme Court of the United States for passing on the content of an amendment. The court, in fact, passed on questions of substance, but upheld the amendments. Thus the Supreme Court seems committed to the doctrine that both the procedure and substance of amendments are judicial questions. It is important to note, however, that an amendment to the federal constitution has as yet never been held void on either ground.

Relatively few attacks have been made on the substance of amendments in the state courts. Apparently the first case in which this question was directly raised was that of *Livermore v. Waite*<sup>34</sup> by the California court in 1894. That court held that an amendment was void in substance because certain of its provisions were to become operative at the will of certain officials mentioned in it, although it was regularly voted on by the people. Neither the federal nor the state constitution imposed such a restriction and it seems that it was one "discovered by the California courts." Two years later the Missouri court took the opposite view in a case involving similar facts.<sup>35</sup> Where the constitution is silent as to the scope of an amendment, the view of the state courts appears to be that the courts may not pass on the character of the amendment.<sup>36</sup> Where the state constitutions contain limita-

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<sup>33</sup>(1798) 3 Dall. (U.S.) 378, 1 L. Ed. 644.

<sup>34</sup>(1894) 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312. The court suggests that the power of the legislature to propose amendments is much less than that of a convention, and that a convention is subject only to the constitution of the United States. The distinction appears unsound, however, as a convention is merely a legal agent of the state for the purpose of amendment just as the legislature is. The court also contends that an amendment which if adopted would be inoperative, or contingent on the acts of a group of individuals, is invalid. But if the people have imposed no such limitations there would seem to be no good reason why such an amendment may not be proposed.

<sup>35</sup>*Edwards v. Lesueur*, (1896) 132 Mo. 410, 33 S. W. 1130. But in *State v. Roach*, (1910) 230 Mo. 408, 130 S. W. 689 an amendment was held void as being legislative in character, and also because it was operative for only ten years; but in dictum the court said that a proposed prohibition amendment would be valid, since prohibition was subject to permanent as well as temporary regulation. This decision was probably a political one.

<sup>36</sup>*State v. Swift*, (1880) 69 Ind. 512; *Prohibitory Amendment Cases* (1881) 24 Kan. 700; *State v. Thorson*, (1896) 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582; *People v. Sours*, (1903) 31 Colo. 369; *Frantz v. Autry*, (1907) 18 Okla. 561, 91 Pac. 193; *Louisiana Ry. & Navigation*

tions on the scope of amendments, it would seem proper for the courts to determine whether the content is proper.<sup>37</sup> Such limitations should be found within the amending clause, and the other articles of the constitution should not be viewed as limitations. Thus the bill of rights and the amending clause are themselves subject to alteration unless expressly forbidden to be altered. Most state constitutions contain no such limitations, however, and the problem therefore seldom arises, as the doctrine of implied limits on the nature of amendments has not been adopted by the state courts.

The constitution of the United States, however, contains an express restriction on the nature of amendments. No state may be deprived of its equal suffrage in the Senate without its consent. Prior to 1808 no amendment could be made abolishing the slave trade, or imposing a direct tax without apportionment. Since that date, unless the courts adopt the view that there are implied limitations, the only criterion of character an amendment has had to meet is that it must not violate the equal suffrage clause. The absence of any limitations as to form or substance is shown in the cases of the eleventh and the eighteenth amendments. The eleventh amendment operated retroactively. The eighteenth amendment by its own provision was not to go into effect until a year after its ratification, and was to be inoperative unless ratified within seven years after its submission by Congress to the states.<sup>38</sup> Though the eighteenth and nineteenth amendments were attacked as void in substance, the contentions were rejected.<sup>39</sup> So far no implied limitations have been admitted, but the Supreme Court is ready to hear arguments as to the content, thus clearly regarding it as a judicial question.

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Co. v. Madere, (1909) 124 La. 635, 50 So. 609; State v. Fulton, (1919) 99 Ohio St. 168, 124 N. E. 172; Switzer v. State, (1921) 103 Ohio 306, 133 N. E. 552, suggesting that a federal amendment may be invalid for indefiniteness; Browne v. City of New York, (1925) 241 N. Y. 96, 149 N. E. 211.

<sup>37</sup>The Alabama constitution, article 18, sec. 284, forbids the change of representation in the legislature on any other than a population basis. Article 17, sec. 2, of the Michigan constitution forbids the use of the popular initiative to amend the amending clause itself.

<sup>38</sup>See Dillon v. Gloss, (1921) 256 U. S. 368, 41 Sup. Ct. 510, 65 L. Ed. 944; Druggan v. Anderson, (1925) 269 U. S. 36, 46 Sup. Ct. 14, 70, L. Ed. 151.

<sup>39</sup>National Prohibition Cases, (1920) 253 U. S. 350, 386, 40 Sup. Ct. 486, 64 L. Ed. 946; Leser v. Garnett, (1922) 258 U. S. 130, 42 Sup. Ct. 217, 66 L. Ed. 505.

The validity of a federal amendment appears to be open to attack collaterally and perhaps directly, at least in the absence of any judicial decisions to the contrary. There would, however, seem to be some difficulty in making a direct attack, such as would not be experienced in the case of an amendment to a state constitution, and in fact the legality has generally been assailed collaterally.<sup>40</sup> A federal amendment involves simply the proposal by Congress and the consent of the state legislatures. A state amendment involves the constitutionally designated action of various officials apart from the legislature and the people so that an opportunity is furnished at various stages to attack it. A federal amendment is not open to attack prior to its passage since neither Congress nor the state legislatures can be enjoined when engaged in legislating or amending.<sup>41</sup> The attack would have to come after the amendment had gone into force, and it would seem a difficult matter to find a successful method of

<sup>40</sup>In *Fairchild v. Hughes*, (1922) 258 U. S. 126, 42 Sup. Ct. 274, 66 L. Ed. 490, it was held that the general right of a citizen to have the government administered according to law and the public moneys not wasted does not entitle him to institute in the federal courts a suit to secure by indirection, a determination whether an amendment about to be adopted will be valid. The action was in the form of a bill in equity, but was held not to be a case within the meaning of article III, sec. 2. See also, *State v. Cox*, (D.C. Ohio 1919) 257 Fed. 344; *United States v. Colby*, (C.C.D.C. 1920) 265 Fed. 998. In *Hanley v. Wetmore*, (1886) 15 R. I. 386, 6 Atl. 777, the court refused to make a declaratory decree against the canvassing board that a state amendment was improperly adopted, on the ground that there was no one on whom the decree would be binding, and that there was no showing of a right.

<sup>41</sup>*State v. Thorson*, (1896) 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582; *People v. Mills*, (1902) 30 Colo. 262, 70 Pac. 322; *Frantz v. Autry*, (1907) 18 Okla. 561, 91 Pac. 193. *Threadgill v. Cross*, (1910) 26 Okla. 403, 109 Pac. 558, 138 Am. St. Rep. 964; *State v. Board*, (1919) 44 N. D. 126, 172 N. W. 80; *State v. Marcolin*, (1922) 105 Ohio 570, 138 N. E. 881; *McAlister v. State*, (1923) 95 Okla. 200, 219 Pac. 134, 33 A. L. R. 1370; *Hamilton v. Secretary of State*, (1924) 227 Mich. 111, 198 N. W. 843.

Contra: *Wells v. Bain*, (1873) 75 Pa. 39, 15 Am. Rep. 563; *Hatch v. Stoneman*, (1885) 66 Cal. 633; *Livermore v. Waite*, (1894) 102 Cal. 113; *Edwards v. Lesueur*, (1896) 132 Mo. 410, 441; *Peonle v. Currv.* (1900) 130 Cal. 82, 62 Pac. 516; *Holmberg v. Jones*, (1901) 7 Idaho 752, 65 Pac. 563; *State v. Roach*, (1910) 230 Mo. 408, 130 S. W. 689, two judges dissenting; *State v. Alderson*, (1914) 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1914B 39; *Tax Commission Case*, (1923) 68 Mont. 450, 219 Pac. 817; *State v. Hall*, (1917) 35 N. D. 34, 159 N. W. 281 seems not to have been followed in *State v. Board*, (1919) 44 N. D. 126, 172 N. W. 80.

For general principles, see *Mississippi v. Johnson*, (1866) 4 Wall. (U.S.) 475, 18 L. Ed. 437; *Clayton v. Calhoun*, (1886) 76 Ga. 270; *Dodd*, Revision and Amendment of State Constitutions 228-232.

assailing it directly. The Supreme Court refuses to act unless there is an actual case or controversy pending. As a matter of fact, the recent federal amendments have been adjudicated in cases where the defendant has set up their invalidity as a defense, or where the plaintiff brings an action and asserts that the amendments do not bar his action since they are void.